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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 55

RAILWAY EXPRESS AGENCY, INCORPORATED,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

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STATEMENT AS TO JURISDICTION ON APPEAL.

The Appellant in support of the jurisdiction of this Court to review the above entitled case on appeal respectfully represents:

A.

The Statutory Provisions Sustaining Jurisdiction

(1) That part of Section 237 of the Judicial Code, as the same was amended by the act approved February 13, 1925, and known as Chapter 229, Section 1 of 43 Stat. at Large, 937 (U. S. Code Annotated, Title 28, Section 344), which provides that "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where is drawn in question, the validity of a statute of any State, on the ground of its being repugnant

to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(2) The act approved January 31, 1928, and known as Chapter 14 of 45 Stat. at Large, as amended by an act approved April 26, 1928, and known as Chapter 440, 45 Stat. at Large, 456, which provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."
>
> "Sec. 2 as amended. The statutes regulating the right of a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right, and of invoking such relief, including the provisions relating to cost, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Judgment and Date of Application for Appeal.

The final judgment denying petition for a rehearing was entered on the 10th day of January, 1930 (Rec. p. 284), by the Supreme Court of Appeals of Virginia, the highest Court of Virginia in which a decision in this suit could be had.

The petition for a rehearing was filed January 7, 1930 (Rec. p. 263 and 283).

The application for this appeal was presented to the Chief Justice of the Supreme Court of Appeals of Virginia on the 28th day of January, 1930 (Rec. p. 290), and the order allowing the appeal was signed by the said presiding Judge on the 28th day of January, 1930 (Rec. p. 298).

Note.—All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Appeals of Virginia and on file with the Clerk of this Court. The record has not yet been printed.

C.

Nature of Case and Rulings Below.

The Appellant, Railway Express Agency, Incorporated, was incorporated under the laws of the State of Delaware with authority to engage in the transportation of property by express over railroad lines in and between all of the States of the United States, District of Columbia, Cuba, Hawaii, Canada and Mexico (Rec. p. 38). On January 25, 1929, a few weeks after its incorporation it applied informally for a certificate of authority to do business in Virginia as a foreign Express Company under Sections 3845 and 3847 of the Code of 1919, and Chapter 158 of said Code entitled "Express Companies." (Rec. p. 216.) It did not seek to enter the State of Virginia to transact a new business, but had succeeded to and was and is now conducting a business which has been carried on in the State of Virginia for upwards of sixty years (Rec. p. 20). It is the successor of the American Railway Express Company, also a corporation of the State of Delaware, which in 1918 was granted a certificate by the State Corporation Commission of Virginia, to do intrastate as well as interstate business in that State; it has assumed all of that Company's liabilities, and has purchased all its property, real and personal, its offices and equipment, its wagons and trucks, and all its supplies, and has taken over its entire organization, and is transporting goods at the same rates and subject to the same Classification and Tariffs previously in effect (Rec. p. 134, 182, 85, 192). The Appellant is a joint agency of the Railroads operating in and across the State of Virginia, and elsewhere, to conduct the express transportation business in their behalf (Rec. p. 190), and thus to provide the express service which the Railroads have not only the right but are under the legal obligation to furnish either directly or through an agent (Express Cases, 117 U. S. 1). Ownership in the stock of Appellant is limited to the Railroad Corporations participating in its organization (Rec. pp. 42).

The business for the year 1928 produced gross receipts for the entire United States of $285,063,377.03; for the State of Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business, and $641,949.86 intrastate business, that is, the interstate Virginia business being 88 per cent and the intrastate business only 12 per cent, and the Virginia intrastate business representing only ¼ of one per cent of the total express business in the United States. (Rec. p. 133.)

The application of the Appellant for certificate of authority to do business in Virginia as a foreign Express Company was refused, and on March 4, 1929, it was formally renewed before said Corporation Commission and evidence taken on its right to be granted such certificate. (Rec. p. 117). On April 8, 1929, the State Corporation Commission refused a certificate of authority to Appellant to do an intrastate express business in Virginia; without prejudice, however, to the right of the Railway Express Agency, Incorporated, to engage in interstate commerce in Virginia (Rec. p. 216).

An appeal was taken to the Supreme Court of Appeals of Virginia, and it affirmed the order or judgment entered by the State Corporation Commission of Virginia, the order of the State Corporation Commision and the judgment of the Supreme Court of Appeals of Virginia being based solely on an alleged prohibition contained in Section 163 of the Constitution of the State of Virginia, adopted in 1902 and found in the Code of Virginia, 1919, at page XCI (Rec. pp. 246-247) (150 S. E. Rep. 420). Section 163 reads as follows:

> "No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating

against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

It was held that any foreign corporation not engaged in business at the time the Constitution of 1902 went into effect, and which thereafter sought to exercise the powers of a public service corporation, could not exercise such powers in the State of Virginia, unless it was first incorporated under the laws of the State of Virginia and became a domestic corporation of such State (Rec. p. 240, 256 and 257). Hence the right of Appellant to do an intrastate business was refused unless it should become a corporation of the State of Virginia, and it was held that as a condition precedent to the right to do such an intrastate business the Appellant, Railway Express Agency, Incorporated, must secure a charter as a corporation under the laws of Virginia (Rec. p. 240, 257). It was suggested both by the State Corporation Commission and the Supreme Court of Appeals of Virginia, that the Appellant might organize a corporation under the laws of the Commonwealth to do intrastate business, and if it desired to do so then merge with such domestic corporation, in which event the Appellant would become a domestic corporation of the States of Delaware and Virginia, subjecting both its intrastate and interstate business to the laws of those States applicable to corporations organized therein.

Appellant contended both before the State Corporation Commission (Rec. p. 111), and the Supreme Court of Appeals of Virginia (Rec. p. 28), that it was lawfully entitled,

under the above named Sections of the Virginia Code of 1919, to do an express transportation business both interstate and intrastate in the State of Virginia, and that a construction of Section 163 of the Constituion of Virginia denying the Appellant the right to conduct intrastate business was void and unconstitutional for the reasons:

First: That it was repugnant to the Commerce Clause of the Constitution of the United States, and the enforcement of the Virginia Constitutional provision wholly to exclude Appellant from transacting an intrastate business in Virginia would be a direct burden upon interstate commerce (Rec. 263 et seq.); and

Second: That it is in conflict with the Constitution of the United States guaranteeing to citizens the equal protection of the laws in depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the Federal to the State Courts on the ground of diversity of citizenship (Rec. 271 et seq.).

From the final judgment entered on the 10th day of January, 1930, on Appellant's application for rehearing by the Supreme Court of Appeals of Virginia, the Appellant now appeals to the Supreme Court of the United States (Rec. pp. 298), and prays that the said judgment of the Supreme Court of Appeals of Virginia (the highest Court of the State in which a decision in this suit could be had), be reversed, upon the grounds: (1) that the said provision of the Constitution of the State of Virginia pursuant to which Appellant has been refused a certificate authorizing it to do an intrastate business in Virginia, is invalid as in violation of the Commerce Clause of the Federal Constitution (Article 1, Section 8, Paragraph 3 of the Constitution of the United States); and (2) in denying to Appellant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (Assignment of Errors, Rec. pp. 291 to 297).

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court (among others) are believed to sustain its jurisdiction of this appeal.

Western Union Telegraph Co. vs. *Kansas*, 216 U. S. 1.
Pullman Co. vs. *Kansas*, 216 U. S. 56.
Herndon vs. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135.
Donald, Secretary of State of Wisconsin, vs. *Philadelphia & Reading Coal & Iron Co.*, 241 U. S. 329.
Kansas City Southern Ry. Co. vs. *Road Improvement District*, 266 U. S. 379, 385.
Frost & Frost Trucking Co. vs. *Railroad Commission of California*, 271 U. S. 583.
Hanover Fire Insurance Co. vs. *Harding*, 272 U. S. 494.
King Manufacturing Co. vs. *City Council of Augusta*, 277 U. S. 100.
Quaker City Cab Co. vs. *Commonwealth of Pennsylvania*, 277 U. S. 389.
Manley vs. *State of Georgia*, 279 U. S. 1.
Helson & Randolph, Co-Partners, vs. *Kentucky*, 279 U. S. 245.
New Jersey Bell Telephone Co. vs. *The State Board of Taxes and Assessments of the State of New Jersey*, No. 254, October Term, 1929, decided January 6, 1930.

(a) The power of a State to exclude a corporation doing an interstate business is not *absolute;* it is *relative.*

Western Union Telegraph Co. vs. *Kansas*, 216 U. S. 1, 33, 34.

> "It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the

> interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."
>
> "We are aware that in *Paul* vs. *Virginia* (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, Sect. 2. *That was not, however, the case of a corporation engaged in interstate commerce;* and enough was said by the court to show, that, if it had been, *very different questions* would have been presented."

Concurring opinion of Mr. Justice White, later Chief Justice, in *Pullman Co. vs. Kansas*, 216 U. S. 56, 68, 70:

> "As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, *and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition.* * * * *Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce* * *." (Italics ours.)

(b) Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.

Wisconsin Railroad Commission vs. C., B. & Q. R. R. Co., 257 U. S. 563

In that case it is stated at page 588:

> "It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

And at page 590:

> "This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

(c) The power of the State to exclude foreign corporations from doing business therein is subject to the important

qualification that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed.

Hanover Fire Insurance Company vs. Harding, 272 U. S. 494, 507.

"* * * It was settled in *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410, and *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, that foreign corporations can not do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is, that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated, in respect of the breach of the commerce clause of the Constitution, by the cases of *Sioux Remedy Company* v. *Cope*, 235 U. S. 197, 203; and *Looney* v. *Crane Company*, 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts, has been held void, *Terral* v. *Burke Construction Company*, 257 U. S. 529; in cases which the State has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation in the State but also on its property without the State, in violation of the due process clause of the Fourteenth Amendment, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346; and finally in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws, *Southern Railway Co.*

v. *Greene*, 216 U. S. 400; *Air Way Corporation* v. *Day*, 266 U. S. 71. * * *"

Terral vs. *Burke Construction Company*, 257 U. S. 529, 532:

> *"The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."* (Italics ours.)

We respectfully submit that this Court has jurisdiction on this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act approved February 13, 1925, and the Act approved January 31, 1928, as amended by the Act approved April 26, 1928.

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